

Nov 29, 2018

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOSHUA N.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 1:18-CV-03014-JTR

ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT AND
GRANTING PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT, IN
PART

BEFORE THE COURT are cross-motions for summary judgment. ECF Nos. 14, 19. Attorney D. James Tree represents Joshua N. (Plaintiff); Special Assistant United States Attorney Thomas M. Elsberry represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 6. After reviewing the administrative record and briefs filed by the parties, the Court **GRANTS** Defendant's Motion for Summary Judgment and **GRANTS, in part**, Plaintiff's Motion for Summary Judgment; and **REMANDS** the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g) and 42 U.S.C. § 1383(c).

PROCEDURAL HISTORY

Plaintiff filed an application for Disability Insurance Benefits (DIB) on January 4, 2011, Tr. 70, alleging disability since December 18, 2010, Tr. 150, due

1 to a broken left tibia, leg surgery in December 2010, a dislocated left ankle, a torn
2 left Achilles heel, lower back pain, carpal tunnel, chronic headaches, a swollen
3 liver, dyslexia, asthma, and a broken left leg, Tr. 182. The application was denied
4 initially and upon reconsideration. Tr. 94-96, 98-99. Administrative Law Judge
5 (ALJ) Laura Valente held a hearing on February 13, 2013 and heard testimony
6 from Plaintiff and vocational expert Kimberly Mullinax. Tr. 39-69. The ALJ
7 issued an unfavorable decision on April 26, 2013. Tr. 18-38. The Appeals
8 Council denied review on June 27, 2013, Tr. 11-16, and Plaintiff requested judicial
9 review from this Court on June 25, 2014, Tr. 716-18, after receiving an extension
10 of time from the Appeals Council, Tr. 6, 9, 806, 810.

11 While the request for an extension of time to file for judicial review was
12 pending before the Appeals Council, Plaintiff filed a subsequent DIB application
13 on April 3, 2014, Tr. 721, alleging disability since April 27, 2013, Tr. 939. This
14 application was reviewed, and on October 6, 2014 Plaintiff was found disabled
15 with an onset date of June 28, 2013. Tr. 739.

16 On May 11, 2015, this Court remanded the 2011 DIB application for
17 additional proceedings. Tr. 741-60, 815.

18 On June 30, 2015, the Appeals Council notified Plaintiff that they were
19 reopening the 2014 DIB application for two reasons: 1) the determination granting
20 benefits provided an inaccurate date of onset; and 2) the evidence received
21 subsequent to the favorable determination contradicted the manipulation
22 limitations in the residual functional capacity determination that was relied upon in
23 granting benefits. Tr. 836-38.

24 On September 25, 2015, the Appeals Council issued a notice of remand and
25 gave the ALJ three instructions: 1) vacate the ALJ decision in the 2011 DIB
26 application; 2) consolidate the 2011 DIB application and the 2014 DIB application
27 into a single electronic record; and 3) issue a new determination on the
28 consolidated claims. Tr. 767. The ALJ held a hearing on March 26, 2017 and

1 heard testimony from Plaintiff and vocational expert Mark Harrington. Tr. 655-83.
2 The ALJ issued an unfavorable decision on November 20, 2017. Tr. 620-35. The
3 Appeals Council did not assume jurisdiction within the prescribed period so the
4 ALJ's November 20, 2017 decision became the final decision of the
5 Commissioner. 20 C.F.R. § 404.984(a). Plaintiff filed this action on January 30,
6 2018. ECF Nos. 1, 4.

7 **JURISDICTION**

8 Final determinations of the Commissioner are appealable to the district court
9 pursuant to 42 U.S.C. § 405(g).

10 **STATEMENT OF FACTS**

11 The facts of the case are set forth in the administrative hearing transcript, the
12 ALJ's decision, and the briefs of the parties. They are only briefly summarized
13 here.

14 Plaintiff was 33 years old at the alleged date of onset. Tr. 150. He
15 completed high school in 1996. Tr. 183. His reported work history includes the
16 jobs of janitor, retail loss prevention worker, painter, security guard, and some self-
17 employment in security. Tr. 170, 184. Plaintiff reported that he stopped working
18 on December 18, 2010 due to his conditions. Tr. 183.

19 **STANDARD OF REVIEW**

20 The ALJ is responsible for determining credibility, resolving conflicts in
21 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
22 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo,
23 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d
24 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is
25 not supported by substantial evidence or if it is based on legal error. *Tackett v.*
26 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as
27 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put
28 another way, substantial evidence is such relevant evidence as a reasonable mind

1 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402
2 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational
3 interpretation, the court may not substitute its judgment for that of the ALJ.
4 *Tackett*, 180 F.3d at 1097. If substantial evidence supports the administrative
5 findings, or if conflicting evidence supports a finding of either disability or non-
6 disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d
7 1226, 1229-30 (9th Cir. 1987). Nevertheless, a decision supported by substantial
8 evidence will be set aside if the proper legal standards were not applied in
9 weighing the evidence and making the decision. *Browner v. Secretary of Health*
10 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

11 **SEQUENTIAL EVALUATION PROCESS**

12 The Commissioner has established a five-step sequential evaluation process
13 for determining whether a person is disabled. 20 C.F.R. § 404.1520(a); *see Bowen*
14 *v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one through four, the burden of
15 proof rests upon the claimant to establish a prima facie case of entitlement to
16 disability benefits. *Tackett*, 180 F.3d at 1098-99. This burden is met once the
17 claimant establishes that physical or mental impairments prevent him from
18 engaging in his previous occupations. 20 C.F.R. § 404.1520(a)(4). If the claimant
19 cannot do his past relevant work, the ALJ proceeds to step five, and the burden
20 shifts to the Commissioner to show that (1) the claimant can make an adjustment to
21 other work, and (2) specific jobs which the claimant can perform exist in the
22 national economy. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-94
23 (9th Cir. 2004). If the claimant cannot make an adjustment to other work in the
24 national economy, a finding of "disabled" is made. 20 C.F.R. § 404.1520(a)(4)(v).

25 **ADMINISTRATIVE DECISION**

26 On November 20, 2017, the ALJ issued a decision finding Plaintiff was not
27 disabled as defined in the Social Security Act. The ALJ identified the relevant
28 time period as October 18, 2010 to April 26, 2013, stating that Plaintiff was

1 granted disability benefits on October 27, 2014 and was currently in pay status. Tr.
2 620.

3 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
4 activity from December 18, 2010, the alleged date of onset through June 30, 2015,
5 the date last insured. Tr. 623.

6 At step two, the ALJ determined Plaintiff had the following severe
7 impairments through the date last insured: fractures of the left tibia/fibula;
8 affective disorder; anxiety disorder; and pain disorder. Tr. 623.

9 At step three, the ALJ found Plaintiff did not have an impairment or
10 combination of impairments that met or medically equaled the severity of one of
11 the listed impairments through the date last insured. Tr. 624.

12 At step four, the ALJ assessed Plaintiff's residual function capacity and
13 determined that from December 18, 2010 to April 26, 2013 he could perform a
14 range of sedentary work with the following limitations:

15
16 This individual can lift and carry 20 lbs. occasionally and 10 lbs.
17 frequently, can stand and/or walk for 2 hours total in an 8-hour day, and
18 can sit for 1 hour at a time, after which he needs to stand-stretch for a
19 few minutes but can continue working while in the standing position.
20 Then he must sit again for 1 hour and so forth. He can sit for 6 hours
21 total in an 8 hour day. He can do no operating of foot pedals. He can
22 occasionally push-pull with the left lower extremity such as for
23 operation of foot pedal. He can perform all postures occasionally
24 except he can do no climbing of ladders, ropes or scaffolds. He can do
25 no kneeling, crouching or crawling. He must avoid all exposure to
26 vibrations, must avoid concentrated exposures to extreme cold, heat,
27 wetness, humidity and hazards. This individual has sufficient
28 concentration to understand, remember and carry out simple repetitive
tasks. He can maintain attention and concentration in 2-hour
increments with usual and customary breaks throughout an 8-hour work
day. He can work superficially and occasionally with the general
public. He can work in proximity to an unlimited number of co-workers
but should not work in coordination with them.

Tr. 625. The ALJ identified Plaintiff's past relevant work as a control area security guard, a loss prevention worker, a window assembler, a hotel guest clerk, and a fire watch/fire inspector and concluded that Plaintiff was not able to perform this past relevant work during the relevant time period. Tr. 632.

At step five, the ALJ determined that, considering Plaintiff's age, education, work experience and residual functional capacity, and based on the testimony of the vocational expert, there were other jobs that exist in significant numbers in the national economy Plaintiff could perform through the date last insured, including the jobs of touch up screener, table worker, and order clerk. Tr. 633. The ALJ concluded Plaintiff was not under a disability within the meaning of the Social Security Act at any time from December 18, 2010 to April 26, 2013. Tr. 634.

ISSUES

The parties agree that the ALJ's determination is not supported by substantial evidence or based on proper legal standards. ECF Nos. 14, 20. The questions presented are (1) what period of time is before the Court and (2) whether the ALJ's determination should be remanded for additional proceedings or for an immediate award of benefits.

DISCUSSION¹

A. Time Period

The Appeals Council instructed the ALJ on remand to vacate her prior

¹In *Lucia v. S.E.C.*, 138 S.Ct. 2044 (2018), the Supreme Court recently held that ALJs of the Securities and Exchange Commission are "Officers of the United States" and thus subject to the Appointments Clause. To the extent Lucia applies to Social Security ALJs, the parties have forfeited the issue by failing to raise it in their briefing. See *Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008) (the Court will not consider matters on appeal that were not specifically addressed in an appellant's opening brief).

1 decision in the 2011 DIB application, consolidate the 2011 DIB application and the
2 2014 DIB application into a single electronic record, and issue a new determination
3 on the consolidated claims. Tr. 767. Plaintiff argues that the ALJ chose not to
4 disturb the October 27, 2014 granting of benefits in the 2014 DIB application and
5 limited her review to the period at issue in the 2011 DIB application. ECF No. 20
6 at 3. He further asserts that the 2014 DIB application is outside of this Court's
7 jurisdiction as Plaintiff appealed the November 20, 2017 decision, which is the
8 final decision of the Commissioner for only December 18, 2010 to April 26, 2013.
9 *Id.* Defendant argues that (1) the consolidated time period for both claims was
10 before the ALJ, (2) the ALJ erred in concluding that the Agency had granted
11 benefits in the 2014 DIB claim on October 27, 2014 and limited her review to
12 October 18, 2010 to April 26, 2013, and (3) this error requires a remand to address
13 evidence that went unaddressed by limiting the time period considered. ECF No.
14 19.

15 In reviewing Plaintiff's complaint, it is clear that he is appealing the final
16 determination of the Commissioner dated November 20, 2017. ECF No. 4; Tr.
17 620-35. This ALJ decision addresses the time period of both the 2011 DIB
18 application and the 2014 DIB application. In her summary of the jurisdictional and
19 procedural history of the claim, the ALJ concluded that Plaintiff was in pay status
20 due to the 2014 DIB application being granted in an October 27, 2014 decision.²
21 Tr. 620. She defined the relevant time period as the alleged onset date, October 18,
22 2010, through the date of her prior decision, April 26, 2013. *Id.* However,
23 throughout the five-step sequential evaluation process, the ALJ oscillates between
24 addressing the time period of the consolidated claims (from the alleged onset date
25 of October 18, 2010 through the date last insured of June 30, 2015) and the time
26

27 ²Benefits were actually granted in an October 6, 2014 determination with an
28 onset date of June 28, 2013. Tr. 767.

1 period of only the 2011 DIB application (from the alleged onset date, October 18,
2 2010, through the date of the ALJ's prior decision, April 26, 2013). Tr. 624-34. In
3 step one, the ALJ addressed the time period of consolidated claims, finding
4 Plaintiff had not engaged in substantial gainful activities from the onset date to the
5 date last insured. Tr. 623. At step two, the ALJ addressed the time period of the
6 consolidated claims, finding Plaintiff had severe impairments from the date of
7 onset through the date last insured. *Id.* At step three, the ALJ addressed the time
8 period of the consolidated claims, finding Plaintiff did not meet or equal a listing
9 from the date of onset through the date last insured. Tr. 624. In making the
10 residual functional capacity determination, the ALJ addressed the period of time
11 for only the 2011 DIB application, prescribing limitations that were present from
12 the onset date to April 26, 2013. Tr. 625. At step four, the ALJ addressed the time
13 period for only the 2011 DIB application, finding Plaintiff unable to perform any
14 past relevant work during the "relevant time period," which she had previously
15 defined as from onset through April 26, 2013. Tr. 632. At step five, the ALJ
16 addressed the time period of the consolidated claims, finding that there were jobs
17 in the national economy Plaintiff could have performed from the onset date
18 through the date last insured. Tr. 633. In the ALJ's concluding paragraph, the ALJ
19 found that Plaintiff was not disabled from December 18, 2010 to April 26, 2013.
20 Tr. 634.

21 The ALJ made findings at steps one, two, three, and five that address the
22 time period covered by the consolidated claims. Therefore, Plaintiff's argument
23 that the ALJ decided not to disturb the granting of Plaintiff's 2014 DIB application
24 is unsupported. Furthermore, Plaintiff's assertion that the ALJ meant to affirm the
25 Agency's prior determination regarding Plaintiff's 2014 DIB application contains
26 two fallacies. First, the agency's prior determination in Plaintiff's 2014 DIB claim
27 was a denial of benefits and a finding that disability was not supported by
28 substantial evidence, Tr. 837-38, and not, as Plaintiff asserts, the initial

determination that his residual functional capacity would preclude work, ECF No. 20 at 5. Second, such an assertion creates a procedural gap between the ALJ's defined relevant time period of October 18, 2010 to April 26, 2013 and the June 28, 2013 onset date for the granting of the 2014 DIB application.

Plaintiff additionally asserts that this Court's order in his previous request for judicial review, Case 1:14-cv-03090-VEB, precludes this Court from considering the 2014 DIB application and the granting of benefits on October 6, 2014. ECF No. 20 at 3 (citing Tr. 758). However, the Court's order in the prior request for review was a sentence four remand meaning the Court did not retain jurisdiction pending further administrative proceedings. Tr. 758-59 (finding that the ALJ's determination could not be sustained, remanding the case, and closing the file). The Supreme Court has found that the "exclusive methods by which district courts may remand to the Secretary are set forth in sentence four and sentence six of § 405(g)." *Shalala v. Schaefer*, 509 U.S. 292, 296 (1993). Sentence four remands are final judgments by the district court and orders in sentence six remands allow the district court to retain jurisdiction pending the outcome of additional administrative proceedings. *Id.* at 297. Each final decision of the Commissioner will be reviewable by separate litigation. *Sullivan v. Finkelstein*, 496 U.S. 617, 625 (1990). The November 20, 2017 ALJ decision is a new and unique final determination of the Commissioner, which addressed the period of time from the date of onset through the Plaintiff's date last insured. Therefore, the Court has jurisdiction over the November 20, 2017 decision.

In conclusion, the period of time before this Court is from the alleged date of onset through the date last insured. The ALJ erred by failing to make a determination at all five steps of the sequential evaluation process that addressed this time period.

B. REMEDY

Plaintiff argues that this Court should look to the medical evidence in this

1 case and make a determination that a finding of disability is inevitable and remand
2 for an immediate award of benefits. ECF Nos. 14, 20. Defendant asserts that the
3 ALJ's error in failing to address the correct period of time necessitates a remand
4 for additional proceedings. ECF No. 19.

5 The decision whether to remand for further proceedings or reverse and
6 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,
7 888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is appropriate
8 where "no useful purpose would be served by further administrative proceedings,
9 or where the record has been thoroughly developed," *Varney v. Secretary of Health*
10 *& Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused
11 by remand would be "unduly burdensome," *Terry v. Sullivan*, 903 F.2d 1273, 1280
12 (9th Cir. 1990); *see also Garrison v. Colvin*, 759 F.3d 995, 1021 (9th Cir. 2014)
13 (noting that a district court may abuse its discretion not to remand for benefits
14 when all of these conditions are met). This policy is based on the "need to
15 expedite disability claims." *Varney*, 859 F.2d at 1401. But where there are
16 outstanding issues that must be resolved before a determination can be made, and it
17 is not clear from the record that the ALJ would be required to find a claimant
18 disabled if all the evidence were properly evaluated, remand is appropriate. *See*
19 *Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*, 211
20 F.3d 1172, 1179-80 (9th Cir. 2000).

21 Here, the ALJ made a residual functional capacity determination for the
22 limited time period for October 18, 2010 to April 26, 2013 stating that she only
23 addressed the medical evidence in the file for this period. Tr. 626. However, the
24 ALJ then used this residual functional capacity determination to make a step five
25 determination from October 18, 2010 to the date last insured, June 30, 2015
26 without considering the medical evidence after April 26, 2013. The evidence not
27 considered by the ALJ in forming the residual functional capacity determination
28 includes substantial treatment notes and the opinions of George, Liu, M.D., Tr.

1 1130-54, C. Donald Williams, M.D., Tr. 1215-40, Kumar Swami, M.D., Tr. 1467-
2 68, and Brady Moss, ARNP, Tr. 1818-19.

3 This is a reviewing Court, and not the trier of fact. Considering a substantial
4 portion of the record was not considered in the ALJ's formation of the residual
5 functional capacity determination, the proper remedy in this case is to remand for
6 additional proceedings.

7 Upon remand, the case will be assigned to a new ALJ. This ALJ will make
8 a new determination at steps one through five from Plaintiff's alleged onset date,
9 October 18, 2010, through Plaintiff's date last insured, June 30, 2015. The ALJ
10 will not incorporate any portions of the any of the prior ALJ determinations due to
11 the amount of evidence these prior determinations failed to consider, but will
12 address the entire record in a *de novo* hearing.

13 CONCLUSION

14 Accordingly, **IT IS ORDERED:**

15 1. Defendant's Motion for Summary Judgment, **ECF No. 19**, is
16 **GRANTED**.

17 2. Plaintiff's Motion for Summary Judgment, **ECF No. 14**, is
18 **GRANTED, in part**, and the matter is **REMANDED** to the Commissioner for
19 additional proceedings consistent with this Order.

20 3. Application for attorney fees may be filed by separate motion.

21 The District Court Executive is directed to file this Order and provide a copy
22 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Plaintiff**
23 **and the file shall be CLOSED.**

24 DATED November 29, 2018.



A handwritten signature in black ink, appearing to be "M" or "Rodgers", is written over a horizontal line.

25
26 JOHN T. RODGERS
27 UNITED STATES MAGISTRATE JUDGE
28